

DE 03-155

TOWN OF ASHLAND

Petition for Valuation Pursuant to RSA 38

Order Following Pre-Hearing Conference

O R D E R    N O.    24,214

September 25, 2003

**APPEARANCES:** McLane, Graf, Raulerson & Middleton, P.A. by Richard A. Samuels, Esq. and Sarah B. Knowlton, Esq. for the Town of Ashland; Devine, Millimet & Branch, P.A. by Mark W. Dean, Esq. for the New Hampshire Electric Cooperative, Inc.; Carl D. Orio, *pro se*; Office of Consumer Advocate by Michael W. Holmes, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

**I. INTRODUCTION AND PROCEDURAL HISTORY**

On August 13, 2003, the Town of Ashland (Town) filed a petition with the New Hampshire Public Utilities Commission (Commission) seeking valuation pursuant to RSA 38:9 of certain utility property of the New Hampshire Electric Cooperative (NHEC). The Town presently supplies retail electric service to most but not all of its residents, with the NHEC serving the remainder. The Town seeks valuation of the NHEC distribution system covering 3.8 miles of North Ashland Road and Route 175, condemnation of which would allow the Town to provide electric service to current NHEC members along those roadways. Valuation under RSA 38:9 is a condition precedent to condemnation under RSA 38:10.

The Commission entered an Order of Notice on August 15, 2003, scheduling a Pre-Hearing Conference for September 10, 2003 and establishing September 5, 2003 as the deadline for intervention petitions. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers on August 29, 2003. The Commission received a timely request for intervention from Carl D. Orio, an engineer and Atkinson resident who is in the business of designing geothermal heating and cooling equipment.

The Pre-Hearing Conference took place as scheduled. The Commission took Mr. Orio's intervention petition under advisement and heard preliminary statements of position from the Town, the NHEC, the Office of Consumer Advocate and the Commission Staff. Thereafter, the parties met in a technical session with Staff and agreed upon a proposed procedural schedule, which Staff transmitted to the Commission.

## **II. INTERVENTION PETITION**

At the Pre-Hearing Conference, Mr. Orio noted that he is not a member of the NHEC and that his intervention request was prompted by his interest in energy conservation and energy efficiency. This prompted the Commission to suggest that his interest in the case might be best served by allowing him to make a statement at hearing, and placing his name on the list of interested persons who will receive Commission issuances in the

docket, as opposed to making him a full intervenor. Mr. Orio agreed, subject to consultation with Commission Staff following the Pre-Hearing Conference. Accordingly, Mr. Orio's intervention petition will be deemed to have been withdrawn.

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. Town of Ashland**

The Town indicated that it filed the instant petition in furtherance of its desire to provide electric service to all customers within its borders. Conceding that it is not in the interest of the NHEC to lose customers, the Town noted that its petition requires the Commission to balance these competing interests.

The Order of Notice entered by the Commission raised the issue of whether the NHEC is a utility within the meaning of RSA 38:1, II and thus subject to the valuation and condemnation provisions of that chapter. The Town answers this question in the affirmative, taking the position that if the NHEC were not subject to RSA 38 proceedings then the Town would simply be authorized to construct the necessary plant and begin serving the customers in the territory covered by the petition.

According to the Town, the appropriate legal standard for the Commission to apply in making its public interest determination is the same "no net harm" standard the Commission uses in evaluating proposed utility mergers.

**B. New Hampshire Electric Cooperative, Inc.**

The NHEC agreed with the Town that the cooperative is a "utility" within the meaning of RSA 38:1, II and thus subject to the Commission's RSA 38 jurisdiction. It took exception to the Town's assertion that in the absence of RSA 38 jurisdiction the Town could simply move ahead with its plans unilaterally.

The NHEC reminded the Commission that the Town of Ashland's effort to serve customers along North Ashland Road has a long history and was the basis for the proceedings that led to *Appeal of Ashland Electric Department*, 141 N.H. 336 (1996). In that case, the New Hampshire Supreme Court agreed with the Commission that the Town was required to seek the Commission's approval under RSA 38 before constructing its own distribution plant for the purpose of serving this area. See *id.* at 340. As the Supreme Court noted, the Town had followed the RSA 38 process to the extent of holding unsuccessful negotiations with the NHEC about acquiring the cooperative's affected plant, thereafter seeking a declaratory judgment to the effect that RSA 38 was not applicable. When the Town did not prevail on its legal theory, it then let the matter drop, according to the NHEC.

Then, according to the NHEC, the Town issued a request for proposals (RFP) in 1999 with regard to selling its entire electric distribution system. The NHEC reported that although

it participated in the Town's RFP process, the Town ultimately did not move forward with the sale. According to the NHEC, the next event was its receipt of another letter earlier this year from the Town of Ashland, commencing the RSA 38 process.

The NHEC indicated that it views the Town as a "sister public power organization," acknowledging that a substantial number of affected customers have expressed an interest in switching their electric service from that of the NHEC to the Town. Nevertheless, the NHEC indicated that it opposes the Town's petition and believes that the proposed acquisition would not be in the public interest.

According to the NHEC, the Town's plan to acquire the applicable portions of the NHEC distribution system and then replace it would result in an economic waste that some combination of Town and/or NHEC customers will have to finance. The NHEC said the same concern applies to both the capital and transactional costs. Conceding that the Town's proposal would reduce electric rates for the affected customers, the NHEC argued that it is inconsistent with the public interest to reduce rates for one group of customers by shifting costs to another group (i.e., in this instance, the remaining NHEC members).

### **C. Office of Consumer Advocate**

The OCA stressed that, because the NHEC has filed a certificate of deregulation with the Commission and is no longer considered a public utility for most purposes under New Hampshire law, it does not represent the NHEC's member/customers in this proceeding. Rather, the OCA indicated that it is participating here because it is concerned that granting the Town's petition here could lead to adverse long-term consequences for residential ratepayers of other New Hampshire utilities. Specifically, the OCA expressed concern that other municipalities could institute similar RSA 38 proceedings throughout the state, leaving remaining utility customers saddled with stranded cost obligations and reversing a century of aggregation in the New Hampshire electric industry. OCA raised the possibility of the Commission imposing an exit fee that would provide compensation to customers not migrating from the utility in question to municipal service.

### **III. PROCEDURAL SCHEDULE**

Following the Pre-Hearing Conference, the parties and Staff conducted a technical conference and, inter alia, agreed upon a proposed procedural schedule that was thereafter transmitted to the Commission via a letter from Staff. The proposed schedule is as follows:

Data Requests (Round I)	Sept. 19, 2003
Responses	Oct. 3, 2003
Data Requests (Round II)	Oct. 10, 2003
Responses	Oct. 24, 2003
Supplemental Pre-Filed Direct Testimony from Town of Ashland	Dec. 5, 2003
Data Requests (Round III) to Town of Ashland	Dec. 19, 2003
Responses by Town of Ashland	Jan. 9, 2004
Data Requests (Round IV) to Town of Ashland	Jan. 23, 2004
Responses by Town of Ashland	Feb. 5, 2004
Prefiled Direct Testimony from NHEC	Feb. 26, 2004
Technical Session/Settlement Conference	Mar. 3, 2004
Data Requests (Round V) to NHEC	Mar. 11, 2004
Responses by NHEC	Mar. 25, 2004
Technical Session/Settlement Conference	Apr. 2, 2004
Prefiled Direct Testimony from Intervenors and Staff	Apr. 9, 2004
Data Requests (Round VI) to Intervenors and Staff	Apr. 16, 2004
Responses by Intervenors and Staff	Apr. 30, 2004
Three-Day Merits Hearing	week of May 17, 2004

Staff's letter noted that this is longer and somewhat more elaborate procedural schedule than that typically adopted by the Commission in a contested case. According to Staff, the operative factors are (1) the Town's determination that the docket cannot be concluded in time for the requisite RSA 38:13

ratification vote to be placed on the warrant for the municipality's 2004 town meeting, obviating any need to "fast-track" the case for that purpose, (2) the necessity of permitting the Town and the NHEC to develop expert testimony and then for all parties to conduct discovery on such testimony, and (3) the reasonableness of allowing intervenors and Staff to present their direct testimony, if any, only after the Town and the NHEC have presented the opinions of their witnesses.

We agree with the parties and Staff that the circumstances justify a procedural schedule of the length and complexity proposed. We therefore approve the schedule as proposed, and establish May 18-20 as the dates for the merits hearing in this docket.

According to the letter filed by Staff, the parties and Staff further agreed that discovery papers could be served electronically, except where the need to furnish maps and other materials of unusual size make this impractical. The parties and Staff requested that we endorse this agreement and grant any necessary rules waivers. Inasmuch as waiving the requirement for the exchange of discovery documents by paper would not disrupt the orderly proceeding of the Commission and is consistent with the public interest, such waiver is granted pursuant to Puc 201.05.



**Based upon the forgoing, it is hereby**

**ORDERED**, that the procedural schedule proposed by the parties and Staff is hereby approved and will govern the remainder of the proceedings in this docket.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of September, 2003.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary